United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-1020

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United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

GERARDO SANCHEZ,

Appellant.

On Appeal From The United States District Court For The Southern District Of New York

APPELLANT'S BRIEF

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MISCELLANEOUS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1020

UNITED STATES OF AMERICA,

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BRIEF FOR THE APPELLANT

STATEMENT OF ISSUES

1. Whether, by pleading guilty, appellant waived his right to raise on appeal the constitutional claims, rejected in the District Court, that the prosecution was barred by the speedy trial, due process and double jeopardy provisions of the Constitution.

2. Whether appellant was entitled to a dismissal of the indictment or a hearing on his claim that the delay of almost six years denied him his right to a speedy trial under

the Sixth Amendment and the due process clause of the Fifth Amendment.

3. Whether appellant was entitled to a dismissal of the indictment or a hearing on his claim that the instant prosecution was barred by the double jeopardy provision of the Fifth Amendment.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Appellant appeals from the United States District Court for the Southern District of New York, the Honorable Henry F. Werker, District Judge. The appeal follows a plea of guilty to a superseding information charging a violation of 26 U.S.C. §§4701, 4703, 4704(a), 7237(a) on November 9, 1976. Appellant was sentenced to a term of five years imprisonment pursuant to 18 U.S.C. §4205(a).

B. PROCEEDINGS AND DISPOSITION IN THE LOWER COURT

The original indictment was filed on November 12, 1975. It accused appellant and three others (Luis Reyes, Hector Echeverria and Julie Fuentes) of a conspiracy to violate 21 U.S.C. §173 and 174.

On March 9, 1976 appellant filed a motion to dismiss the indictment on the ground that the pre-indictment delay violated his right to a speedy trial and represented a denial of due process. On March 22, 1976, Hector Echeverria a co-defendant--sought to dismiss the indictment because it abridged his right not to be twice placed in jeopardy. Appellant joined in this motion. The Honorable Henry F. Werker denied both motions in an opinion dated July 16, 1976 (A. 7-30).

Appellant sought dismissal of the indictment in papers submitted July 2, 1976 on speedy trial grounds emanating from post-indictment delay. This application was likewise denied in a separate opinion by the lower court on July 16, 1976. The petition was renewed on November 3, 1976 and denied, without opinion, from the bench on the date the guilty plea herein was entered.

Appellant filed a petition for a writ of mandamus on November 1, 1976 with the United States Court of Appeals for the Second Circuit seeking to bar prosecution for the speedy trial and double jeopardy reasons previously advanced in the District Court. This Court denied the motion on

November 12, 1976.

C. STATEMENT OF FACTS

The original indictment listed twenty-six overt acts performed in furtherance of the conspiracy between December 2nd and 30th, 1970. Twenty-five of them took place on or before December 16th--the date on which the appellant and Echeverria were arrested in Hermosillo, Mexico. The last overt act mentioned had occurred on or about December 29, 1970--thirteen days following appellant's arrest and while he was in jail--and consisted of Luis Reyes telling Roniel Medina "that he hoped to hear from Gerardo Sanchez' contact for narcotics in fifteen to twenty days."

On or about December 1, 1970 the United States Bureau of Narcotics and Dangerous Drugs (hereinafter referred to as BNDD) learned of the conspiracy from an unindicted co-conspirator--Roniel Medina. BNDD agents joined with the Mexican authorities in the subsequent investigation. They arrested the co-defendant Julio Fuentes on or about December 11, 1970 and induced him to cooperate with them. The next day, at the direction of the BNDD, a hotel room

previously occuppied by Fuentes in Hermosillo, Mexico was searched by Mexican agents. On or about December 13, 1970 the BNDD ordered Fuentes to make a tape recorded call to appellant and try to convince him to go to Mexico. The appellant went to Mexico on December 16th, whereupon he was arrested by the same Mexican agents who had searched Fuentes' room in Hermosillo.

Following his arrest, appellant was confronted by a BNDD agent at the Sonora State Penitentiary. At this agent's direction, appellant was forcibly fingerprinted and photographed. At a later date this process was repeated. Not until several weeks later was the appellant fingerprinted and photographed for the purpose of the Mexican prosecution.

Because of continuing narcotics activity by other members of this enterprise, the BNDD investigation continued into 1971 (Affidavit of Det. Eric Seise, Exh. A). Isabel Suarez (Mrs. Echeverria) was arrested and agreed to cooperate with the authorities, including the offices of the United States Attorneys for the Southern and Eastern Districts of New York. Her help led to the arrest of seven people and the seizure of approximately 37 kilograms of cocaine prior

to her conviction and sentence to probation. One of those arrested was Ruben Pena, who, in turn, also decided to help the Government. He testified against Hector Echeverria in a 1972 trial at which appellant served as interpreter. Before the filing of the indictment herein the court records pertaining to Mrs. Echeverria were impounded. Later, her name was omitted in the Government's Bill of Particulars listing known co-conspirators.

The Mexican and American authorities decided that Mexico would pursue appellant's prosecution. Nevertheless, appellant suffered as a consequence of American involvement. Sometime around August, 1971 appellant was told that his request to be transferred from a maximum to a minimum security section of the prison had been denied because of a United States detainer lodged against him. Furthermore, at the time of appellant's scheduled release, this detainer caused the Mexican prison officials, at first, to refuse to allow appellant to leave.

Appellant was tried without a jury (Mexican law did not provide for jury trials for the offense charged) and convicted, in part, upon evidence furnished by the United

States. Subsequently, the Mexican Federal Court of Appeals reversed the conviction, dismissed the indictment and ordered appellant's release after he had served more than thirteen months in jail.

Appellant returned to the United States where he has maintained his residence to date. In fact, as a result of charges filed in the Southern District Court of Florida, appellant was in federal custody from May, 1972 until September, 1973. From his release until June, 1976, appellant remained under the supervision of the United States Board of Parole.

ARGUMENT

POINT I

APPELLANT PRESERVED HIS CLAIMS THAT THE PROSECUTION WAS BARRED BY THE SPEEDY TRIAL, DUE PROCESS AND DOUBLE JEOPARDY PROVISIONS OF THE CONSTITUTION AND DID NOT WAIVE SUCH RIGHTS BY HIS SUBSEQUENT PLEA OF GUILTY.

Prior to his guilty plea appellant raised all the issues presented on appeal both in the District Court and in a writ of mandamus in this Court. Not until every remedy had been exhausted did appellant enter his plea--the only means left other than a trial for him to be in a position

to assert that his rights were trespassed by the prosecution in the lower court.

Some rights can be exercised only by going to trial and, understandably, a guilty plea must waive them. Examples include trial by jury, confronting witnesses and the privilege against self-incrimination. On the other hand, certain attacks on the proceedings have been held waived by a guilty plea, such as a claim of a coerced confession (McMann v. Richardson, 397 U.S. 759 [1970]; Parker v. North Carolina, 397 U.S. 790 [1970]; see Brady v. United States, 397 U.S. 742 [1970] or that "the indictment was returned by an unconstitutionally selected grand jury" (Tollett v. Henderson, 411 U.S. 258, 260 [1973]).

However, in Blackledge v. Perry (417 U.S. 21 [1974]) the Supreme Court observed that there "the nature of the underlying infirmity is markedly different" (417 U.S. at 30) than in Tollett and the Brady trilogy. In Blackledge, as in the case at bar, the relator contended that his guilty plea had not waived his double jeopardy claim. While the Court rested its decision on a due process violation and did not reach the issue whether double jeopary can be

asserted following a guilty plea, the language of Mr. Justice Stewart suggests that it could:

> "Although the underlying claims in Tollett and the Brady trilogy were of constitutional dimension, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. . . . Unlike the defendant in Tollett, Perry is not complaining of 'antecedent constitutional violations' or of a 'deprivation of constitutional rights that occurred prior to the entry of the guilty plea.' 411 U.S. 266, 267. Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge. The very initiation of the proceedings against him in the Superior Court thus operated to deny him due process of law" (417 U.S. at 30-31; see Robinson v. Neil, 409 U.S. 505 [1973]).

Appellant suggests that this rationale applies equally to his speedy trial and double jeopardy claims which existed on the day the indictment was filed.

Subsequently, the Supreme Court decided Menna v. New York (423 U.S. 61 [1975]) in which it reversed a lower court ruling that a guilty plea waives a double jeopardy attack. The Court relied upon Blackledge and held that "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even

if the conviction was entered pursuant to a counseled plea of guilty" (423 U.S. at 62). The choice of language by the Court renders its decision equally applicable to a Sixth Amendment speedy trial claim. In a footnote the Court added:

> "In most cases factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.
>
> "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that--judged on its face--the charge is one which the State may not constitutionally prosecute" (423 U.S. at 62-63, n.2).

In sum, appellant submits that constitutional issues not going to guilt survive a guilty plea where they have been duly raised and rejected.

Nevertheless, appellant must face this Court's decision in United States v. Doyle, 348 F.2d 715, [2d Cir.], cert. den. 382 U.S. 843 [1965]). There Judge Friendly

stated: "An unqualified plea of guilty, legitimately obtained and still in force, bars further consideration of all but the most fundamental premises for the conviction, of which the subject matter jurisdiction of the court is the familiar example. The claims [speedy trial] here asserted have nothing of this quality" (348 F.2d at 718-719; see United States v. Mann, 451 F.2d 347 [2d Cir. 1971]). Appellant respectfully requests this Court to reconsider this Second Circuit Rule in light of Menna and the other cases cited above and submits that subsequent decisions over the past twelve years have eroded the Doyle holding.

It should be noted that in view of this Court's denial of interlocutory relief, the swiftest and least expensive procedure for all parties was a guilty plea followed by an appeal. Whatever resolution is now reached, no new trial will be required. To make appellant suffer a trial and conviction of a greater offense, and concomitantly harsher punishment, in order to raise these constitutional issues on appeal, would be to exact a tremendous price for the testing of one's rights (see United States v. Warden of Attica State Prison, 381 F.2d 209, 213 [2d Cir. 1967]). It would be sadly

ironic and a "catch 22" situation if appellant had to go to trial in order to assert that going to trial deprived him of the constitutional protections of the Fifth and Sixth Amendments.

Most likely the Government will argue that at least with respect to the alleged speedy trial defect, the failure to expressly preserve it for appeal in the District Court with the consent of the prosecution waived that claim (United States v. Mann, supra). However, an effective waiver must be "an intentional relinquishment or abandonment of a known right or privilege" and is determined on a case-by-case basis (Johnson v. Zerbst, 304 U.S. 458, 464 [1938]; Schneckloth v. Bustamonte, 412 U.S. 218, 238 [1973]; Fay v. Noia, 372 U.S. 391, 398-399 [1963]; Green v. United States, 355 U.S. 184, 191-192 [1957]).

Here, appellant "waived" his right to appeal during the plea proceedings (A.56-57). However, any waiver was hardly an intentional relinquishment (Schneckloth v. Bustamonte supra at 238). Rather, it was improperly exacted from him and coercively obtained. Appellant wanted to retain his right to appeal. Only after he informed the District Court that in

spite of his factual guilt, he believed that antecedent constitutional violations permeated the proceedings, was he forced to waive that claim. "Here the prosecutor attempted, in effect, to deprive the defendant of his right to appeal the adverse determination of his speedy trial claim, by confronting him with a possibly unfair trial (because so tardy) on the one hand, and on the other offering him a reduced plea only if he would relinquish the speedy trial claim" (People v. Blakely, 34 N.Y.2d 311, 314 [1974]; accord, People v. White, 32 N.Y.2d 393, 399-400 [1973]; People v. Chirieleison, 3 N.Y.2d 170, 174 [1957]). In conclusion, even if appellant "waived " his right to appeal, the waiver was involuntary, ineffective and a denial of due process.

POINT II

THE DISTRICT COURT IMPROPERLY DENIED WITHOUT A HEARING APPELLANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUND THAT THE DELAY OF ALMOST SIX YEARS DENIED HIM HIS RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. APPELLANT BECOMES AN "ACCUSED"

It is undisputed that American agents participated in the investigation, arrest, prosecution and detention of

appellant in Mexico. The Government concedes that the BNDD informed the Mexican officials of the presence of cocaine in Hermosillo and participated in the search of a hotel room there on December 11, 1970. The BNDD reports which the Assistant United States Attorney turned over to the District Court further reflect that American agents fingerprinted appellant and questioned him during his confinement in a Mexican jail. Finally, they include a notation that a verbal request of the Mexican authorities that they notify the United States of appellant's release was honored.

Actually, American participation was greater than just enumerated, as pointed out in the Statement of Facts, supra. The granting of a hearing would have resolved any ambiguity, but this relief was denied in the court below. Suffice it to say that appellant's arrest in Mexico was a joint venture of Mexican and American agents and was followed by a conscious decision pursuant to the Single Convention on Narcotic Drugs that Mexico prosecute with American assistance--a not surprising move in view of the relative ease of obtaining a conviction there (Exh. B).

Based upon the foregoing appellant submits that he

became an "accused" for speedy trial purposes when he was arrested in Mexico on December 16, 1970. In rejecting this concept, the District Court stated that it is "not bound by the actions of the Mexican court irrespective of the fact that American agents may have participated in the arrests or provided information which led to them." Appellant however, does not urge that "the actions of the Mexican court" control for speedy trial purposes, but only that the Mexican-American arrest does.

Appellant relies upon Dillingham v. United States (423 U.S. 64 [1975]), where the Court noted that "the Government constituted petitioner an 'accused' when it arrested him and thereby commenced its prosecution of him" (423 U.S. at 65). The Supreme Court went on to reaffirm its determination in United States v. Marion (404 U.S. 307,320-321 [1971]) that:

> "To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends" (423 U.S. at 65).

(It cannot be doubted that appellant suffered all the hardships and ignomies of arrest during his thirteen months in Mexican jails). The Court included the following relevant passage in the continuation of the above quote:

> "So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
>
> "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer" (id.).

Appellant was arrested for the same transaction which is the subject of these proceedings, detained, tried, convicted and acquitted on appeal in Mexico.

Of Course, the arrest here was neither on American soil, nor ultimately, because of a subsequent decision of the Mexican and American officials involved, for a prosecution in the United States. Other courts have found these factors irrelevant.

In United States v. Cabral (475 F.2d 715 [1st Cir. 1973]--a pre-Dillingham case--the court held the right to a speedy trial on a weapons charge in federal court attached at the time of the defendant's arrest by state authorities for other crimes, because the weapon seized at that arrest was turned over to the federal authorities three days later. The Cabral court rejected the notion that the date of the filing of the indictment controlled. Unlike the present situation, there the Government neither instigated nor participated in any way in the completely unrelated prosecution by a separate state sovereign.

The Fourth Circuit in United States v. MacDonald (531 F.2d 196, 204 [4th Cir. 1976]) followed the spirit of Dillingham and held that a military arrest activated the speedy trial guarantee of the Sixth Amendment, rather than a subsequent civilian arrest for the same acts. The tribunal thought that the Government had acted in its capacity as a "single sovereign"--a situation not unlike the present one which involves American control at all levels.

In the Fifth Circuit, too, an arrest by one sovereign may commence the running of speedy trial rights in another

sovereignty and may require a hearing to determine the basis for the arrest (Gravitt v. United States, 523 F.2d 1211, 1215 [5th Cir. 1975], rehearing and rehearing en banc denied, 526 F.2d 378, 379 [1976]; see United States v. Duke 527 F.2d 386, 388 n. 1 [5th Cir. 1976]).

In anticipation of a possible reply by the Government, appellant stresses that his physical custody outside the United States during his confinement in Mexico does not lessen the deprivation of his rights. "That the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens is well settled" United States v. Toscanino, 500 F.2d 267, 280 [2d Cir. 1974]). Moreover, the speedy trial guaranty can even be invoked by persons outside the court's jurisdiction (United States v. Salzmann, Civ. No. 76-1357 [2d Cir. September 28, 1976], see Smith v. Hooey, 393 U.S. 374 [1969]). Unlike Salzmann and Smith, appellant could not demand a trial in another jurisdiction, because he did not know that he would be prosecuted anywhere else.

Thus, appellant asks this Court to assess his speedy trial claim based upon his becoming an "accused" on

December 16, 1970, but submits that the use of any date, including November 12, 1975 when the indictment was filed, must result in the dismissal of all charges.

B. THE SIXTH AMENDMENT

Appellant urges this Court to find a denial of his right to a speedy trial based upon the passing of five years and eleven months from the date of his arrest in Mexico until the date of his plea. The arrest took place on December 16, 1970. The filing of the indictment and the re-arrest of appellant transpired on November 12, 1975. A Notice of Readiness was filed by the Government on March 1, 1976. Motions by appellant and those indicted with him were decided on July 16, 1976.

Pursuant to telegrams issued by the court, appellant and counsel appeared on September 9, 1976 and answered ready for trial. The proceedings on that date (A. 34-39) reflect that the Government also announced it was ready to proceed. However, its actual state of readiness appears dubious. A new Assistant United States Attorney had been assigned to the case and was not in court (subsequently, yet another Assistant would appear as counsel on the November trial date).

Furthermore, the Government had not yet complied with a previously issued court order that it obtain certain documents for a co-defendant. In fact, Honorable Henry F. Werker stated, "Mr. Flannery [the Assistant assigned to the case] is not prepared to start tomorrow morning nor is the Court." The case was set down for trial on November 8, 1976. Appellant pleaded guilty on November 9, 1976.

With this background in mind appellant asks this Court to consider the factors to be weighed as outlined in Barker v. Wingo (407 U.S. 514 [1972]).

1. Length of the delay

The indictment was filed one month prior to the expiration of the Statute of Limitations. Another year passed before the scheduled trial date.

2. Reason for the delay

The delay up until November 12, 1975 is solely attributed to negligence on the part of the Government. The case file was in Florida and while working on an unrelated matter involving a co-defendant, the Government stumbled upon it (A. 32-33). Considering appellant's continuous availability and the knowledge of the American authorities,

as revealed in the Statement of Facts, supra, and the District Court's opinion (A. 26), as well as the possession of the case file by an arm of the Government itself, this lack of due diligence is inexcusable.

Following appellant's arraignment, an untested notice of readiness was filed almost four months later on March 1, 1976. After the lower court's rulings on these motions on July 16, 1976, the case was first scheduled on September 9, 1976 to be tried on November 8, 1976. Even without the benefit of a hearing, except for the period between March 1st, and July 16th, none of the delay can be even remotely attributed to appellant. During the pendency of these motions, appellant, too, was ready, subject to the government's response and the court's decision.

3. Assertion of right

Appellant could not demand a trial until he learned of the existence of a prosecution in November 1975. As indicated above in the Statement of the Case, appellant raised the issue in the courts. Of course, even silence on appellant's part would not constitute a waiver of his right to a speedy trial (Barker v. Wingo, supra at 526-527; United

States v. Roberts, 515 F.2d 642, 647 [2d Cir. 1975]). Nevertheless, appellant appeared and answered ready on all dates after March 1, 1976, including September 9, 1976 after the pretrial motions had been decided.

4. Prejudice

Appellant suffered thirteen months incarceration in Mexico before his conviction flowing from the same transaction which forms the basis for the indictment herein, was reversed.

The anxiety, concern and financial loss to appellant and his family were incurred from December, 1970 through January, 1972 and then renewed during the one-year pendency of the indictment. The travel restrictions imposed as a bail condition have prevented his participation in various educational programs, conferences and seminars related to his study of criminology. The extensive time and energy appellant devoted to research and preparation for trial left no time for him to complete his thesis in criminal justice.

Appellant was sentenced in the Southern District Court in Florida in 1972 and following his incarceration was on parole until June, 1976. The delay in

prosecution deprived him of the opportunity of receiving a concurrent sentence with that term as well as with the Mexican sentence. Also, when sentenced in Florida, the Mexican arrest was part of the background in the pre-sentence report and, undoubtedly, prejudiced him then.

The public, too, is prejudiced, for imprisonment of the appellant--a rehabilitated man following his parole and resumption of a respected role in the community--could perhaps have had a deterrent effect six years ago and now removes from society a useful and contributing citizen. Appellant's work as a volunteer with drug abusers and his prior non-involvement in criminal enterprises attest to the harm, rather than benefit, this prosecution has produced.

Appellant submits that a balancing of these factors inevitably leads to the conclusion that he was denied his right to a speedy trial under the Sixth Amendment.

C. <u>THE FIFTH AMENDMENT</u>

Should this Court decline to find a violation of appellant's right to a speedy trial under the Sixth Amendment, or should this Court determine that this right has

been waived, it is submitted that the initiation and conduct of the proceeding herein amount to a denial of due proce s (see Blackledge v. Perry, supra at 30-31).

In considering this claim, appellant asks the Court to study the unique factual pattern outlined above, the merit of the speedy trial arguments heretofore advanced and the similarities between this prosecution and the Mexican prosecution discussed again under Point III, infra. Also relevant are Rule 48(b) of the Federal Rules of Criminal Procedure, Rule 4 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (approved January 5, 1971, effective July 5, 1971), Rule 4 of the Southern District of New York Plan for Achieving Prompt Disposition of Criminal Cases (approved February 28, 1973, effective April 1, 1973) and the Petite Policy.

Rule 48(b) [1] of the Federal Rules of Criminal

1/"Dismissal

"(b) By Court: If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in brining a defendant to trial, the court may dismiss the indictment, information or complaint."

Procedure provides an important speedy trial remedy with standards less strict than those imposed by the Sixth Amendment. Both the intent and spirit of this provision were violated.

The 1971 Second Circuit Rule [2] and the Southern District Plan Rule [3] in effect during the pendency of this

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2/ "In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed."

3/ "In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days."

case (see United States v. Furey, 514 F.2d 1098 [2d Cir. 1975]) use similar language and were not followed. An application seeking dismissal based upon them, as well as Rule 48(b), was denied in the District Court. Appellant notes that for purposes of these Rules, it is averred that the date of "arrest" or "detention" is December 16, 1970, but, in any event, the Government failed to comply with them.

The Petite policy established by the Department of Justice bars multiple prosecutions in different jurisdictions for the same transaction and the failure to abide by it here indicates that appellant is a victim of an abuse of the discretion to prosecute (Petite v. United States, 361 U.S. 529 [1960]; Marakar v. United States, 370 U.S. 723 [1962]).[4/]

When these various factors are viewed together, appellant submits that the basic unfairness of the prosecution herein surfaces and the due process clause compels dismissal of all charges.

4/ Following the Supreme Court decisions in Abbate v. United States (359 U.S. 187) and Bartkus v. Illinois (359 U.S. 204) decided on March 30, 1959, Attorney General William P. Rogers issued a memorandum on April 5, 1959 barring a federal trial "when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the department. No such recomendation should be approved by the Assistant Attorney General in charge of the division without having it first brought to my attention" (New York Times, April 6, 1959, pp 1 & 19).

POINT III

THE DISTRICT COURT IMPROPERLY DENIED WITHOUT A HEARING APPELLANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUND THAT THE INSTANT PROSECUTION WAS BARRED BY THE DOUBLE JEOPARDY PROVISION OF THE FIFTH AMENDMENT.

Although appellant does not pose a typical double jeopardy claim, all the interests sought to be protected by that provision are present.

The prosecutions in Mexico and the United States of necessity rest upon different statutes [5] (see Indictment, A. 1-5). Nevertheless, the relevant laws are aimed at the same evils and here are based upon the identical transaction.

Appellant recognizes the dual sovereignty theory announced in Abbate v. United States (359 U.S. 187 [1959]) and

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5/ The appellant was charged in the Federal District Court of Hermosillo, Sonora, Mexico with a violation of Article 195 of the Federal Penal Code, dealing with violations or Crimes Against Health: "Whoever elaborates, deals with, transports, possesses, buys, steals, supplies even gratis, or in general commits any act of acquisition, supply, transportation or traffic of narcotics without complying with the requirements set forth by the Laws, Agreements or International Treaties and other Sanitary dispositions as those mentioned in Art. 193."

Bartkus v. Illinois (359 U.S. 204 [1959]). However, subsequent cases have watered down the concept leaving its future viability in doubt (Ashe v. Swenson, 397 U.S. 436 [1970]; Waller v. Florida, 397 U.S. 387 [1970]; Benton v. Maryland, 395 U.S. 784 [1969]; Murphy v. Waterfront Commission, 378 U.S. 52 [1964]; Elkins v. United States, 364 U.S. 206 [1960]; People v. Cooper, 20 CrL 2362 [Sup. Ct. Mich] [February 2, 1977]). Certainly, this Court can broaden the constitutional protections and examine the underlying facts or remand for a lower court determination thereof. It is difficult to imagine what interest has been served by the initiation of these proceedings at such a late date.

Even if this Court adheres to the dual sovereignty doctrine, it need not apply it in the present case. As previously noted, the American authorities were in privity with the Mexican prosecution and should not be allowed two opportunities to obtain the same conviction. In his opinion Judge Werker declined to impose any infringement upon the sovereignty of the United States and noted:

> "To hold otherwise would unnecessarily hinder federal law enforcement. It would be an intolerable burden to the federal judiciary to require it to

> analyze criminal prosecutions in foreign countries to determine to what extent, if any, such prosecutions are coterminus with a pending federal action. It would impinge upon the sovereignty of the United States to hold that its authority to proceed against a criminal defendant depends upon the absence of similar proceedings in a foreign jurisdiction."

It is respectfully argued that this rationale cannot excuse subjecting a defendant to double jeopardy and is inapplicable here, in that the foreign jurisdiction cooperated with the American authorities and proceeded under United States guidance and pursuant to the Single Convention on Narcotic Drugs, 1961 (Exh. C). Such a voluntary surrendering of sovereignty, by treaty, statute or otherwise is a common circumstance in the international resolution of law enforcement problems. Unfortunately, appellant was denied a hearing in the District Court and, thus, deprived of a chance to substantiate his double jeopardy contentions.

Finally, in view of the language utilized in Ashe v. Swenson (397 U.S. 436,448 [1970][Brennan J., concurring]), United States v. Papa (533 F.2d 815, 820 [2d Cir. 1976]), United States v. Bommarita (524 F.2d 140, 146 [2d Cir. 1975]) and United States v. Mallah (503 F.2d 971, 985 [2d Cir. 1974],

cert. den. 420 U.S. 995 [1975]), appellant maintains that the better and fairer standard in assessing double jeopardy claims involving conspiracy charges is the "same transaction test." Appellant is confident that he can meet his burden of going forward, should this Court remand for a hearing.

CONCLUSION

The judgment of conviction in the District Court should be reversed and the indictment and superseding information dismissed, or in the alternative, the case should be remanded for an evidentiary hearing on the violation of appellants Fifth and Sixth Amendment rights.

Respectfully submitted,

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EXHIBIT A

PROBABLE CAUSE

Deponent States that during the months of December 1970 and January 1971, the latest date being January 21, 1971, your deponent has been told by a confidential informant who has furnished information on approximately twenty five occasions over the past year which has been investigated by your deponent and found to be correct that:

(A) Isabel Suarez, Pedro Rojas, Manuel Villaseca and Ruben Pena, in concert with many other individuals are presently engaged in importing Cocaine Hydrochloride from Chile and Mexico into the United States and that they meet at 514 West 184th Street, Apartment 4-S, New York, New York where they discuss the importation and distribution of the Cocaine Hydrochloride. The informant received the above information by being present while the aforementioned conspirators discussed the scheme to import and distribute the Cocaine Hydrochloride and discussed their meeting place.

(B) The aforementioned informant has been present during the beginning of December 1970 when the conspirator Isabel Suarez discussed the importation of Cocaine Hydrochloride with unidentified persons on the telephone at 514 west 184th Street, Apartment 4-S, bearing the telephone number 212-795-1544.

(C) Isabel Suarez offered the aforementioned informant 2½ Kilos of Cocaine Hydrochloride at a price of $10,000. per Kilo during the first part of December 1970, and the informant saw the aforementioned 2½ Kilos of Cocaine Hydrochloride at 514 West 184th Street, Apartment 4-S, at that time.

(D) The informant told your deponent on December 5, 1970 that the conspirators Isabel Suarez, Pedro Rojas, Manuel Villaseca and Ruben Pena are presently awaiting a large shipment of Cocaine Hydrochloride. The informant was told this by the conspirators within the past week.

(E) Investigation by agents of the Narcotics Division of the New York City Police Department determined that on December 1970, unidentified persons were arrested in Mexico in connection with Drugs (Cocaine Hydrochloride) imported from Chile, South America into Mexico with its final destination being the United States. Special Agents of the United States Bureau of Narcotics and Dangerous Drugs believed that the aforementioned Cocaine Hydrochloride was part of the same scheme.

(F) The aforementioned informant was present at 514 West 184th Street, Apartment 4-S, New York, New York on several occasions at the end of December 1970 and beginning of January 1971 when the conspirators Isabel Suarez, Pedro Rojas, Manuel Villaseca and Ruben Pena telephoned to various cities in Mexico and South America on the afore-

mentioned telephone and ordered Cocaine Hydrochloride to be brought to the apartment. Subsequently, someone brought the Cocaine Hydrochloride and the informant saw the aforementioned Cocaine Hydrochloride in a number of ¼ ounce packages in the apartment.

Det. Eric Seise Sh #1793

Sworn to before me
Feb. 5, 1971

Sgt.

EXHIBIT B

ARTICLES FROM THE LOS ANGELES TIMES ENTITLED "WAR ON DRUGS: MEXICO NO PLACE TO GET CAUGHT", DECEMBER 9, 1974, AND "U.S. EMBASSY ROLE HIT—AMERICANS CHARGE MEXICAN TORTURE IN DRUG CONFESSIONS", DECEMBER 10, 1974 BY STANLEY MEISLER; "STARK SCORES EMBASSY ON MEXICO DRUG STAND," DECEMBER 10, 1974, BY JACK NELSON

WAR ON DRUGS: MEXICO NO PLACE TO GET CAUGHT

(By Stanley Meisler)

MEXICO CITY.—More than 100 Americans, mostly young, are facing long prison sentences in Mexico as a result of joint narcotics enforcement policies of the Mexican and U.S. governments.

Their plight in an alien land known for strict drug law enforcement and harsh prison conditions has been largely ignored in the United States.

American officials assisted U.S.-trained Mexican agents in the apprehension of many of the Americans, but the defendants were tried in Mexican courts bound by laws that are less protective than American law of the rights of suspects.

Many of the Americans were forced to sign confessions in Spanish that they did not understand and were otherwise denied due-process rights to which they would be entitled under U.S. law.

In some instances, U.S. drug enforcement officials acknowledge, Americans are convicted in Mexico in cases that would bring acquittals if they were tried in a U.S. court.

Many of those arrested for smuggling are relative amateurs who, for a few thousand dollars, carry a pound or two of cocaine from South America to sell to dealers in the United States.

Largely as a favor to the United States, Mexican authorities arrest them while they are in transit in the international airport at Mexico City and charge them with importing cocaine into Mexico.

However, the Drug Enforcement Agency of the U.S. Justice Department acknowledges that by arresting them in transit, Mexico is protecting the United States, not Mexico.

"It would be just as easy for U.S. agents (in South America) to put the finger on them in the United States as it is in Mexico," an American narcotics official said. But he added that U.S. officials prefer to alert Mexican authorities because of that nation's tougher enforcement laws.

The DEA is so pleased with the enforcement and conviction record in Mexico that the United States and Mexico, according to a DEA official, plan to utilize an old extradition treaty which is based on Mexican law "that allows for prosecution of Americans in Mexico for crimes committed in the United States."

Interviewed in Washington, Humberto E. Moreno, an official who has coordinated efforts of DEA agents in Mexico, said that the extradition treaty, signed in 1800, has seldom been used. It was used in 1967, he said, when a Mexican citizen who had violated narcotics laws in San Diego was arrested, tried and convicted in Tijuana, Mex. The Mexican was sentenced to five years, Moreno said.

Moreno, praising the Mexican prosecution record, said:

"If we were to put a chart with our prosecution figures on it and the Mexican figures on it, it would show that the Mexicans do much better than our courts on convictions and penalties.

"Mexico has much stiffer narcotics laws and a much stiffer attitude toward enforcing them. The Mexicans are giving defendants six years in cases that we are losing in American courts."

(While the U.S. maximum penalty for possession of narcotics with intent to distribute is 15 years in prison, the average sentence for offenders is 3 to 5 years with the possibility of parole.)

Many of those imprisoned are from California. A large number are educated and articulate people who insist they have been unfairly treated and who have enlisted the aid of relatives and friends to bring their plight to the attention of members of Congress.

(80)

With DEA planning to greatly expand its joint enforcement efforts with the Mexican Federal Police, the Los Angeles Times has undertaken an extensive investigation into how that enforcement program has worked so far and how Americans suspected of drug smuggling have fared.

In Mexico City, California, and Washington, reporters have sought the facts behind allegations that American suspects have been:

Beaten during interrogation sessions and forced to sign confessions in Spanish by Mexican agents trained by the DEA.

In some instances questioned by Mexican agents accompanied by DEA agents whose presence at such sessions is unauthorized.

Largely ignored by U.S. Embassy officials charged with the responsibility of protecting the rights of American citizens arrested in Mexico City.

Exploited by Mexican attorneys and at least one Los Angeles attorney who have preyed on the suspects' friends and relatives, bilking them of many thousands of dollars.

Beaten in prisons that are known for their cruelty, including the notorious Lecumberri prison, where extortion is the rule.

In its investigation, The Times had access to the files of Rep. Fortney H. (Pete) Stark (D-Calif.), who has been working with relatives of many of the prisoners in investigating the situation. Stark, a member of the House's Special Subcommittee on International Narcotics Traffic, said in an interview he plans to call for a congressional investigation of the matter.

Stark and his staff have compiled a large file documenting approximately 100 cases, including the treatment of Americans by Mexican police, courts and prisons; allegations about the failure of the U.S. Embassy to assist them, and the role of the U.S. government in the Mexican narcotics enforcement program.

Much of the documentation consists of written statements by prisoners and their relatives.

The arrests at the Mexico City airport have been a special sore point among the American suspects because in their view they have been tried and punished in Mexico for a crime that, in essence, was against the United States.

Robert J. Eyman, the regional director of DEA in Mexico City, said in an interview: "Mexico's ability to interdict this cocaine is a significant step forward as far as the United States is concerned."

An official of the U.S. Embassy here put it in more colorful terms: "It's just like someone was inside your neighbor's house with a bomb that he was going to throw at your house. Wouldn't you be happy if your neighbor stopped him?"

But there is disquiet about the program elsewhere. Numerous Congressmen have written to the U.S. Embassy in Mexico City requesting more information about the plight of the Americans in Mexican jails.

According to the U.S. Embassy here, 528 Americans were imprisoned in Mexican jails as of Nov. 1. Of these, 441 were jailed on narcotics charges. This is more than one-third of all the Americans imprisoned on such charges in foreign jails throughout the world. The U.S. Embassy here says that about 125 were arrested while in transit at the Mexico City airport and charged with importing cocaine into Mexico.

Fifty of the 125 have been sentenced 6½ to 13 years in prison; the others expect a similar fate. The other 316 Americans are serving or will serve, prison terms of 1 or 2 years.

A strong case can be made that most were caught because they were offending a Mexican government genuinely concerned about the problem of drugs within its own country.

But the arrests at the airport of the amateur smugglers—known as "mules" or "burros"—differs in that cocaine is not a major Mexican problem.

Dr. Guido Belasso, the director general of the Mexican center for the Study of Drug Addiction, a government agency, said of cocaine in a recent interview: "There are a few users here. But it is by no means a social problem."

The cocaine arrests represent only part of the results of recent joint American-Mexican efforts to stem the drug traffic. American narcotics agents long believed that part of the American problem would be eased if the Mexican government moved against its drug producers, traffickers and smugglers since Mexico is the source of most of the marijuana and a large part of the heroin used in the United States.

In September, 1969, the Nixon Administration set up "Operation Intercept" at the frontier, in part to bring pressure on the Mexican government. For 10 days,

U.S. Border Patrol and Customs agents thoroughly searched every person and car crossing the border from Mexico. The interminable delays disrupted border commerce and held up Mexican workers with jobs in the United States. And it dissuaded U.S. tourists from making trips into Mexico.

Mexico, with the economy heavily dependent upon American tourism, got the message. As a U.S. embassy official said recently, "The United States mechanized its leverage in Operation Intercept, and this sensitized the Mexicans to the problem." The Mexican government agreed to join the U.S. government in "Operation Cooperation"—a program to crack down on the drug traffic from Mexico to the United States.

Under Operation Cooperation, the U.S. government, according to embassy officials, has given Mexico $14 million in aid for drug-law enforcement, including $8 million in the current fiscal year. Most of the money has been spent on 28 helicopters, used by Mexico to hunt for opium poppy fields. In addition, the U.S. government has trained 276 Mexican federal police and 52 customs agents either in the United States or Mexico in drug enforcement and inspection. This means that the vast majority of Mexican federal and customs agents have had such training.

During this period, Mexico has significantly increased its destruction of poppy fields and heroin laboratories and its arrest of traffickers and smugglers, both Mexican and foreign.

The U.S. Embassy does not have statistics prior to Operation Intercept, but one embassy official estimated that the total number of Americans in jail was about 100—most of them for failing to pay their hotel bills. By July, 1970, there were 187 Americans in Mexican jails on drug charges alone. By July, 1971, the figure was 234. Now it is 441.

Despite the Mexican cooperation, there still is a feeling in some U.S. circles that Mexico is not doing enough. During Operation Cooperation, the amount of heroin coming from Mexico increased from 15% to 60%.

In March, 1973, two congressmen, Reps. Morgan F. Murphy (D-Ill.) and Robert H. Steele (R-Conn.), issued a report insisting that "the battle to stop narcotics from entering the United States from Mexico is being lost." They said that "the U.S. Embassy in Mexico must be more forceful in impressing upon Mexican officials that vigorous action is necessary at all levels of government."

In a recent interview, an important Mexican government official said, "There still is considerable pressure; by that I mean normal diplomatic pressure. In fact, a substantial part of the recent talks on the border between the two presidents was on this subject." He was referring to the meetings in late October between President Ford and President Luis Echeverria of Mexico.

There is a difference of opinion among U.S. officials about whether the United States specifically asked for the program to stop cocaine "mules" at the Mexico City airport.

"At no point to my knowledge did we go to the Mexicans and ask for this," a State Department official said in an interview.

Regional Director Eyman of the DEA said, "The United States has encouraged this government and all other governments to improve their enforcement, including airport surveillance. In that sense, we are glad to see it. But did we go out and specifically ask for it? The answer is no."

However, Moreno, the project coordinator of the Mexico program, told The Times, "we motivated it."

Moreno said the program was a gentlemen's agreement between the attorney generals of the two countries.

The Mexican campaign coincided with a training program by the U.S. Customs Service. As part of a worldwide project, U.S. Customs trained two Mexican customs supervisors in the United States in April, 1973, and then sent instructors to Mexico to train 50 customs inspectors in November, 1973. According to U.S. Customs, its training was "oriented towards the practical aspects of seizure, searches, narcotics identification, cargo control, passenger and baggage control, and all other phases of border control enforcement."

In addition, U.S. Customs provided the Mexico City airport in September, 1973, with an American dog handler and a dog trained to sniff narcotics.

The arrests of the Americans at the airport began in late summer of 1973, after the Mexican supervisors returned from training in the United States, and reached its high point in the spring of 1974, after the Mexican customs inspectors had

completed their classes. The campaign has since petered out. There [illegible] only [illegible] arrest of an American for cocaine importation from late August to Nov. 1 of this year.

The Mexicans have also arrested a small number of other foreigners at the airport for cocaine importation, including six Canadians. According to the U.S. Embassy, no Mexican has been arrested at the airport for this offense.

The airport campaign has revealed some details about the involvement of American DEA agents in the work of Mexico's anti-narcotics program. The U.S. DEA has 26 employes in Mexico City, Guadalajara, Monterrey, Hermosillo, and Mazatlan. Of these, 26 are classified as agents. In addition, DEA agents in U.S. border towns have responsibility for working with Mexican agents in the Mexican border towns.

U.S. officials have seemed reluctant to reveal exactly what these DEA agents do. In a confrontation with American prisoners at Lecumberri prison last July, U.S. Consul General Peter J. Peterson told them, "There are no American police officers attached to the embassy operating in Mexico."

Technically, this is correct, for the U.S. DEA agents do not have the power of arrest in Mexico. But they do perform certain police functions, like taking part in the interrogation of arrested persons and supplying tips to Mexican police officials about suspected offenders.

Even this role might not have been known if it were not for the evident carelessness of one agent. Several American prisoners have said that Americans were present during their interrogations at the airport, but the prisoners did not know who they were. In one case, however, an American identified himself to a prisoner as Arthur Sedillo, a DEA agent attached to the U.S. Embassy in Mexico City.

Faced with this evidence, U.S. Consul General Peterson has confirmed that DEA agent Sedillo, who is no longer in Mexico, was present during that interrogation. But Peterson said he know of no other case. Regional director Eyman, however, has confirmed that DEA agents have been present in other interrogations.

"There are occasions," Eyman said, "when the government of Mexico will request cooperation or assistance in the interrogation of English-speaking offenders." Eyman said U.S. agents are called in because there is a language problem or the Mexicans need the DEA's "knowledge of what goes on in the United States" or "if we alerted them" to the offender in the first place.

Eyman said "we maintain liaison with the Mexico airport operation" but "there really is no dire need for our presence" in the interrogations.

This involvement of the DEA in the interrogations raises the question of whether the U.S. government has been zealous in protecting the rights of the U.S. citizens arrested in Mexico.

Contrary to international convention, Mexican federal police officials, in almost every case, have refused to allow the American prisoners at the airport to phone the U.S. Embassy for assistance. This has meant that by the time a representative of the office of the consul general, which handles the problems of arrested Americans, has reached a prisoner, he has already signed a confession in Spanish.

With the DEA so closely involved in the airport operation, it would seem a simple matter for the DEA in one part of the embassy building to phone the consul general in another part whenever the DEA knew an American was arrested.

Both Peterson and Eyman insist that this is done as a matter of routine. But, in the one case in March, 1974, the consul general confirms that DEA agent Sedillo was present, embassy records show that the DEA did not notify the consul general. The consul general's office found out about the case by reading about it in the Mexican newspapers.

In a frank moment, a U.S. Embassy official shed some light on this. "It's an educational thing," he said. "At first, the DEA thought that we were trying to get these kids out of jail. Now they understand the need to cooperate with [illegible]."

A number of Americans have accused Mexican officials of beating and torturing them during their interrogations. The U.S. Embassy has passed on these complaints to the Mexican government. The Mexican government denies the charges.

Eyman said he does not believe such abuse takes place. "I would take these allegations with a grain of salt," he said.

But, according to informed sources, [illegible] agents ordering them to leave [illegible]

Asked about this, Eyman replied, "If our agents are present when any activity violates the civil rights of any person, we would leave. Our people do not participate or ... them to post bond and then leave the country." The sentences of 6½ to 13 years received by 70 of the Americans are considered too severe by the Mexican courts to allow bond.

Many prisoners insist that they have paid large fees to lawyers and bribes to court officials to gain freedom, only to be informed later that this was impossible because of U.S. government pressure.

The accusation has troubled the U.S. Embassy enough to solicit a disclaimer from the Mexican Bar Assn.

In a letter to the embassy, Andres Melo Abarrategui, president of the association, said, "We have no knowledge, either official or unofficial, of any intervention by this diplomatic mission on Mexican judicial authorities to prejudice the cases of American citizens on trial in this country on drug charges."

This issue is clouded. On one hand, it is possible that Mexican court officials, knowing the U.S. government is watching them, may be reluctant to deal softly with these prisoners. On the other hand, it is convenient for Mexicans who have accepted large fees or bribes to blame the U.S. government when they fail to do what they have promised. . . .

U.S. Embassy Role Hit—Americans Charge Mexican Torture in Drug Confessions

(By Stanley Meisler)

Mexico City.—In September, 1973, a young Californian, call him Jim, was arrested in Mexico City's airport while changing planes on a trip from South America to Los Angeles. Mexican federal police said they found seven ounces of cocaine, five ounces of marijuana and two ounces of hashish in his baggage.

According to a statement he has sent to Rep. Fortney H. (Pete) Stark (D-Calif.), Jim denied the charges. He told the Mexican police agents that he was not carrying cocaine from Columbia to sell to a dealer in the United States.

"I was taken by six agents to a room and beaten at gunpoint to unconsciousness two or three times," Jim wrote 11 months later.

". . . The next morning I was taken to the interrogation room and then the real beating started. I was a Vietnam veteran. And that made things worse, as the agents said it was a question of their manhood whether they could break me. And feeling death close at hand, I begged for legal assistance from either a lawyer or the U.S. Embassy.

"I was forced to remove my clothes and the agents produced a metal rod (evidently an electric cattle prod) and a pail of water. I was forced to pour the water over my head and the questioning resumed. Each question resumed. Each question was followed by a jolt from the metal rod.

"I lay limp like a corpse after the first two hours of shocks, but it didn't matter to the agents. They only became more determined to make me talk. I jerked back to life each time they jolted me. I could not even talk, my whole system was so confused. But it kept on for six hours. And then I returned to my cell to think about it and recuperate."

The next morning, Jim signed a confession, and is now in Lecumberri Prison in Mexico City awaiting an almost sure conviction and sentence of 6½ to 13 years.

Jim's case is not typical. Most of the 125 Americans in Mexico City prisons on cocaine charges say they avoided torture by signing whatever the Mexicans asked, even though it was written in a language they did not understand. Jim's statement in fact is the worst account of torture in the files of Rep. Stark, who has become concerned about what he believes is the failure of the U.S. Embassy to protect Americans arrested in Mexico on drug charges. Stark has made his file [illegible]. The

Although [illegible] case of Jim, in a graphic way, illustrates the predicament of [illegible] Americans all of whom had intended to carry cocaine from Mexico to the United States. They have been arrested and charged with [illegible] in Mexico even though they were in transit to the United States.

Although importation of cocaine is a violation of Mexican law, the American suspects feel that they were tried and convicted in Mexico for a crime that, in effect, was against the United States.

Their arrest in Mexico has subjected them to a far different system of justice from that of the United States.

Officials of the U.S. Drug Enforcement Administration acknowledge that they motivated and encouraged this campaign at the Mexico City airport and are pleased with the results.

At the same time, there seems to be a hesitancy within the U.S. Embassy in Mexico City about dealing with charges of torture, partly because some American officials doubt them, partly because American diplomats evidently do not want to offend the Mexican government.

U.S. officials tend to play down or deny the accusations. Asked if torture takes place, Robert Eyman, regional director of the DEA in Mexico City, said, "I don't think it does. I have never seen it. I have never seen a cattle prod. I would take these allegations with a grain of salt."

But the U.S. Embassy has thought enough of the evidence to pass on to the Mexican government a list of 11 complaints of abuse during interrogation, including the case of Jim. The Mexican government denied the complaints.

The embassy has taken the official line that beatings during interrogation must be exaggerated and isolated incidents.

"We have to assume," U.S. Consul General Peter J. Peterson said in an interview, "that the authorities would not countenance mistreatment of American citizens. We have no evidence to substantiate any charge that abuse is the rule here."

To a charge that the embassy has not tried hard enough to accumulate such evidence, Peterson said, "We have had to look into charges made months after the arrest."

This seems to be true in a number of the cases. Prisoners have detailed instances of torture to Rep. Stark that they never mentioned to the first U.S. consular officers they met. But there are other cases that indicate carelessness about evidence on the part of the embassy.

In the case of Jim, for example, embassy records show that he met a consular officer three days after his arrest and complained that he was "sadistically tortured." Yet the consular officer, in his report of the visit, did not include any physical discription of Jim's condition. Nor was there any attempt by the embassy to have an American doctor examine Jim.

In another case, an American girl has complained that Mexican agents, during her interrogation, tore earrings off her pierced earlobes. If true, the evidence of the physical damage would still be there a few days later. The embassy file on her case, however, does not indicate when a consular officer first saw her personally. The file states only that her parents saw a consular officer two weeks after the arrest. According to the embassy record, the parents did not make any complaint about physical abuse. Peterson said the embassy first heard about the earrings in an Associated Press story months later.

The embassy might collect more evidence about physical abuse or, in fact, prevent it if U.S. consular officers could reach an American prisoner soon after his arrest. But Mexican police agents invariably refuse to allow an American prisoner to phone the embassy even though such a refusal violates the Vienna Convention on consular relations.

Peterson said that a consular officer usually sees the prisoner from three to five days after his arrest. According to Rep. Stark's files, the delays have been as long as 20 days.

The reason for the refusal by Mexican officials to allow the embassy phone calls is obvious. "Their requirements are their requirements," said Peterson. "They believe they would be interfered with in their investigations" if the prisoners phoned.

The embassy has protested this breach of the Vienna Convention. "Just about two to three weeks ago," Peterson said in mid-November, "we took over a note I've discussed it personally with the consular affairs director of the Ministry of Foreign Affairs. The ambassador has discussed it personally. There have been protests each time, really."

Because of this, Peterson said, "we have had a far better record of performance in the last four months" on the phone calls. The record, however, does not bear this out completely. There have been few cases in the last four months. In the last one, in late October, the Mexican police again refused to allow the American to phone the embassy.

There is a question about how seriously the Mexican government takes a protest on this issue. On one hand, the U.S. DEA has trained the Mexican police agents and praised them for arresting Americans at the Mexico City airport. On the other hand, the U.S. consul general's office is complaining that the police are violating an international convention.

Ironically, although the U.S. Embassy has difficulty in finding out when an American is arrested at the airport on charges of cocaine importation, private Mexican lawyers seem to have no such trouble. In a large number of cases, parents in the United States were first notified of the arrest of their son or daughter by a Mexican lawyer, who then asked for thousands of dollars to represent them. In at least one case, according to the files of Rep. Stark, the notification came from a Los Angeles attorney, Daniel Davis, who identified himself as a cousin of a Mexico City attorney, Jorge Aviles.

The lawyers have asked from $6,000 to $45,000 both to free the prisoners and to pass on money to prison authorities to better the conditions of the Americans while awaiting their promised release. The purchase of better conditions is a standard in Mexican jails.

The money has been taken from parents even though the chances of a Mexican lawyer arranging the release of an American prisoner on these charges is now almost nil.

In 1973, lawyers were able to arrange the release of a few prisoners by pleading that they could not be guilty of importing cocaine into Mexico because they had never passed beyond the customs barriers at the airport into Mexico. In early 1974, however, the Mexican Supreme Court ruled that, according to an international convention, the customs area of an airport should be treated as if it were the territory of the country in narcotics cases. That shut off the main argument of the defense lawyers.

The U.S. Embassy supplies a list of lawyers to all prisoners but puts a disclaimer on the list. "In providing this listing," the disclaimer says, "the American Embassy at Mexico assumes no responsibility for the professional ability or integrity of the persons or firms whose names appear in the list given below."

In most cases, however, the parents in the United States have already paid out fees to a lawyer not on the list long before the consular officer shows up with the Embassy list of lawyers. Very few prisoners have used the lawyers on the list. One lawyer on the list, Pablo Sotomayor Gomez, used by a few prisoners, has now been removed from the list because, according to Peterson, "he has been completely the source of some pretty unshakable belief on the part of the prisoners that we are pressuring the Mexican government to keep them there."

Several parents insist that a consular officer, Danny B. Root, recommended attorney Jorge Aviles to them even though he is not on the embassy list. Several parents say Aviles then took thousands of dollars from them although he knew he could not help. Peterson said recently that the embassy has helped one parent file a legal complaint in Mexico against Aviles seeking a refund.

Root, whose tour of duty in Mexico has ended, has denied ever recommending Aviles to a parent or prisoner.

"Neither I nor anybody in the embassy recommended Aviles or anyone else," Root said in a telephone interview before he left Mexico. "We don't do that sort of thing."

Root was backed up on this by the consul general. "I cannot accept that one of our consuls would be in cahoots with Aviles," Peterson said.

In one case, a mother said she received a phone call from Aviles, who told her that he had Danny Root with him. An American then came to the phone, identified himself as Root, and told her Aviles "was one of the best and most reputable lawyers" and that the parents "would have no worries with him."

Peterson said that Root had denied this in an affidavit and that he, in fact, was not even in Mexico City on that date but in the interior of the state of Veracruz far from a phone.

In another case, a mother has written Rep. Stark that, on a visit to the embassy, "I asked about the qualifications of Mr. Aviles. And Mr. Root said the embassy did not recommend attorneys, but if he were in the same spot our son was in, he would have Mr. Aviles represent him. We took this as a recommendation."

Peterson, however, said that the mother must have misinterpreted what Root might have told her. "All Danny Root knew," Peterson said, "was that there were cases in the past where Aviles, who is not on the list, was used by a number of prisoners and had gotten at least one case off."

In the case of legal assistance, as in the case of [illegible] interrogations and prison [illegible], the U.S. government takes the [illegible]

p. Stark has proposed that the U.S. Embassy provide some kind of legal advice
d support to American prisoners overseas much like the kind of help given by
e Pentagon to American servicemen arrested overseas.
In the case of servicemen, the U.S. government accepts that it has a special
ponsibility to them. They are government employees sent overseas by the
ernment.

STARK SCORES EMBASSY ON MEXICO DRUG STAND

(By Jack Neison)

ASHINGTON.—The U.S. Embassy in Mexico has been aware of torture and
r mistreatment of Americans arrested in Mexico City on narcotics charges,
has failed to take action to protect them, Rep. Fortney H. (Pete) Stark
Calif.), said in a letter Monday to Secretary of State Henry A. Kissinger.
tark said he had detailed and documented evidence that "indicates that
icans arrested and incarcerated in Mexico are denied their legal rights,
treated in a discriminatory and inhumane manner by the Mexican courts
penal institutions, and are (along with their families and friends in this
ntry) subjected to expensive extortion demands from attorneys, court officials
prison personnel."
mbassy officials have failed to take action to assist the Americans, Stark
e, even though they are aware of:
e torture used during interrogation sessions.
U.S. Drug Enforcement Administration agents being present during inter-
ations.
Repeated violations of Mexican legal procedures in cases involving Americans.
Unethical attorneys who contact families and friends of arrested Americans
d successfully exploit these people for thousands of dollars (at times even
ng the embassy itself as a reference).
The treatment and extortion that constitutes "prison life" for these Americans.
Stark wrote that it is "likely" that appropriate congressional committees will
estigate the U.S. Embassy's operations in Mexico and added that he hoped
ssinger would "initiate a prompt 'inhouse' review and begin corrective meas-
s within the Department of State."
Stark told The Times that records his office has compiled of 90 Americans
ted on drug charges in Mexico show that in 54 cases the prisoners contend
were victims of extortion.
n 63 cases, he said, the individuals, including some women, said they had
n tortured.
n his letter to Kissinger, Stark said Americans arrested in Mexico are ini-
ly told they have no rights and that even the U.S. Embassy is unconcerned
h their situation. The actions and inaction of the embassy would tend to
ort that position."
The embassy fails to insure that arrested Americans are allowed to immedi-
y contact their families, their attorneys, or even the embassy itself," the
r continued. "The embassy has failed to * * * rect the interrogation proce-
which often includes torture, forced confessions and unknowing self-
rimination."
rk stressed that he did not condone trafficking, selling or use of illegal
s. "If these individuals are guilty of crimes, I believe they should be sub-
d to the judicial system in either this country or Mexico," his letter
tinued.
"As a member of the House's Special Subcommittee on International Narcotics
ffic, I strongly support the international efforts to reduce and hopefully one
eliminate the flow of narcotics into this country.
However, in our zealous attempts to combat narcotics traffic, we must con-
ue to insure and protect the rights of all individuals involved."
tark urged that the U.S. Embassy adopt a new policy regarding Americans
sted in Mexico and suggested that the State Department analyze the Depart-
t of Defense legal assistance program for armed services personnel arrested
oreign countries.
This excellent and comprehensive program from another government depart-
t could serve as a model for the Department of State," Stark said.
ark also urged that the State Department take steps to assist Americans
ly imprisoned in Mexico.

Article From the Arizona Daily Star, Entitled, "Mexico Owes Justice to Foreign Prisoners," by Bill Waters, May 4, 1975

"Prohibited Are Penalties of Mutilation and of Infamous Character, Marking, Whipping, Use of Sticks and Torture of Any Kind . . ."—From Chapter 1, Article 22, Mexican Constitution

Sunny Mexico, where the climates of the tropics warm the clear water as it rushes toward palm-lined beaches . . .

Sunny Mexico, where you'll find charming, hospitable, friendly people . . .

Sunny Mexico, where the cultures of the Old and New Worlds have joined to make a modern, dynamic nation . . .

Sunny Mexico, where your civil liberties aren't worth a peso. Perhaps they might carry a black-market value of as much as five figures' worth of dollars, however . . .

Some 3 million Americans visit Mexico each year. For the vast majority of them, the trips are full of wonderful memories. For some, however, fear, horror and unspeakable atrocities turn their tours into nightmares that destroy their lives, their careers, or, at the very least, their good feelings toward their fellow man.

Incommunicado jailings, confiscation of property and torture—cattle-prodding, finger-breaking, injuries to the sex organs and severe beatings are the most common—have been suffered by many *norteamericanos* in recent years.

One lawmaker knows of more than 150 such cases. Many more than that sit in consular files. Others may not have been reported, save for a call to the first newspaper office encountered on the return to the U.S.

Still others have escaped such treatment, or at least have mitigated it, by paying outrageous fines or by being exorted by lawyers who find it profitable to prey upon the *Turistas*.

Few of the victims are innocent. The terror tactics are applied mainly to dope-smugglers and to tourists who have failed to comply with Mexican law or who have been so foolish as to drive there without Mexican insurance coverage.

Mexico's constitution carries an equal-protection clause as well as some prohibition of abuse of defendants. It carries other clauses that may appear barbaric to U.S. citizens—72 hours of confinement without notification to family, one year without issuing formal sentence—but which are, nonetheless, the law of the land.

Is torture the treatment given all defendants, Mexican or otherwise? Yes and no. Mexicans know enough about their graft-ridden justice system to buy their way out of trouble. Also they know what's happening to them. U.S. defendants, who don't get the interpreters and court-appointed attorneys provided to Mexican defendants this side of the border, wind up signing coerced confessions that keep them behind bars indeterminately.

There is more than Mexico's constitution at issue in the treatment of the gringos. As a signatory of the Vienna Convention and of bilateral U.S.-Mexico consular treaties and as a member of the United Nations General Assembly, which adopted the Universal Declaration of Human Rights, Mexico owes justice to foreigners accused of crimes.

The job of making sure that U.S. citizens' rights are respected falls to our consulates. Federal law puts that duty upon them. Even by the accounts of many vice-consuls, they're not doing the job.

"The majority of cases," said one diplomat at the vice-consular level, "are the kind that could be resolved within 24 hours. It rarely works out that way, however; the situation deteriorates into a quest for bribe money and, if that fails, the gringo winds up with an over-long stay in jail."

When that sort of thing happens, say many of our diplomats, they complain to the police officials who may have failed to tell the consulate that they have a *norteamericano* in custody. There is no chance to determine whether torture tactics have been used.

d one yo g diplomat, "Most of the time we don't even get a reply—from
s or immigration officers or from the police.
n't think they take us that seriously," was his analysis of the situation.
watching his fellow citizens run the gamut of abuse over the past few
e has become very bitter. "If Mexican officials choose to violate their own
ution," he says, "there's nothing we can do about it."
be so, at his level. The consulates, which U.S. taxpayers spend $2.4 million
to maintain in Mexico, time and again have shown their impotence in the
judicial abuse.
ey cannot protect the rights of visiting countrymen, then why are they
en?
e here mostly as a convenience to the Mexicans," was the way one young
ervice officer saw his post's visa-issuing role.
tates provide other services—industrial and commercial consultation,
ne bureaucratic care for U.S. residents overseas and help for out-of-cash
ren, among others—but in Mexico, it seems, the U.S. has lost sight of a
nction.
s failure to perform that function springs from a lack of legal or financial
the responsibility lies with Congress.
formance of that function is being hindered by Mexican officials, well,
on has a history of heavy-handed treatment of our southern neighbors,
of which may be put to present use.
ea of leaning on Mexico prompts shudders among diplomats.
ly things aren't *that* drastic," was the response from John Dreyfuss, the
e Department's country director for Mexico, and Joseph Livornese, who
rge of special consular services at State.
at I could only ask, during a recent visit to Dreyfuss' office in Washing-
y many cases of the kind so common in the Arizona-Sonora borderlands
take to make things *that* drastic?
gesture of the State Department had no answer.
rnia Democratic Congressman Fortney "Pete" Stark did.
's staff has amassed more than a gross of complaints during nine months
ing into U.S. defendants' problems in Mexico.
half to two-thirds of those cases," he said during an interview at his
raised sufficient questions of violation of rights under the Mexican con-
to warrant a full investigation."
submitted a resolution of inquiry seeking what information the State
ment has on the situation. First hearings, by the Political and Military
Subcommittee of the House International Relations Committee, took
ril 29.
Julyan, a Stark aide, said he and other staffers have collected informa-
n defendants' families in many parts of the U.S.
on an incredible educational process," said Julyan. "There's been such
e extortion involved." The families turn quickly to the embassy. Instead
nce, they get dumped on."
t of the State Department's indifference to the plight of the gringo de-
s came from a young veteran of the department, who has served over-
is now in Washington.
of those defendants," he said, "are involved in dope-trafficking charges.
r innocent, they're mostly longhaired hippie types, and during recent
rations, that kind of person is strictly low-priority. State's not about
ered with their civil rights."
is colleagues noted the irony that Operation Intercept, and the U.S.
ent into dope-busting during the subsequent Operation Cooperation,
on Mexican officials the idea that our Drug Enforcement Agency wants
o commit atrocities upon suspected *contrabandistas;* that the crazy
will pay them to beat confessions out of their *compadres.*
, in Stark's view, had better be bothered about those rights. For support,
is staff cite two sections of the U.S. Code.
ays that the U.S. will provide adequate attention to its citizens in
countries. The other says that if an American in a foreign country is
ld unjustly, and the fact is called to the attention of our President—
pens to be the secretary of state's boss—he must investigate. If it is
hat the person is being held in violation of the constitution or laws of
ntry or in violation of his rights as a U.S. citizen, "the President shall

use such means, not amounting to acts of war, as he may think necessary and proper to effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

The law derives from an 1868 act, and is an odious leftover from gunboat-diplomacy days.

Nonetheless, Julyan notes, it has not remained dormant. In the 1964 case of *Zemel v. Rusk*, it was dusted off as an argument that a person should not be allowed to travel to a nation in which consular protection and negotiation could not be guaranteed.

The country in question was Cuba, but you have to wonder if any better protection is offered to our citizens who travel in Mexico.

Is the idea, then, to require passports for Mexican travel, and to prohibit American visits there until defendants' rights are guaranteed?

Not even Stark's proposals would go that far.

"What we must do," Julyan figures, "is give consular officers authority, support and stronger policy if they need it. It's incumbent on consular officers to represent the best interest of U.S. citizens."

Julyan noted that our armed forces provide "all kinds" of legal defense for personnel in trouble overseas—attorneys at Department of Defense expense and observers of the proceedings in which servicemen are involved.

There has to be a balance, he suggests, between what Defense does and what State does not do.

In the area of court observers, he may have hit upon the solution. An official operating under the watchful eye of a foreign diplomat is more likely to do his job than one doing the same with complete autonomy.

Meanwhile, said Julyan, the cases involving the more than 500 U.S. defendants now being held in Mexico has radicalized them, their families and most others who have heard of their plight.

It's not the kind of news calculated to boost Mexico's tourism industry.

In fact, said one member of our consular corps of Mexico, perhaps that should be the target—the Department of Tourism, which just this year was elevated to cabinet level.

"Tourism," said that young diplomat, "is bigger than they'll admit. If they were to get the idea that Americans are reluctant to visit, perhaps the people who stand to profit from it might lobby for some action."

That's one of the things Stark has in mind.

Asked if it might serve our interest to institute a boycott of Mexico, the Congressman said, "Not only is it a good idea, but if we get no action, I intend to organize it.

"In this case, where the State Department is so indifferent, so haughty, there is reason to use a secondary boycott. They (the Mexicans) understand power and authority, and they have no tolerance for weakness; that's how we've gotten in the position we're in."

Tourism Secretary Julio Hirschfeld Almaldo confirmed, to some extent, Stark's view of the State Department last night in Hemosillo.

Hirschfeld said his department has received nothing concrete from the U.S. by way of complaints. He urged that such complaints be sent his way.

In Hermosillo more than 300 travel-industry executives gathered late week for a tourism-boosting convention.

Many of them said that they have felt a certain let-up in what until recently had been a booming business. They attributed it more to the economic strain being felt by would be travelers, gringo and Mexican alike, but were mostly in agreement that one thing they don't need is a rash of roughing-up the tourists—hippie, fact-cat or otherwise.

None, however, showed much sympathy for the foreign residents of Mexican jails. Legal problems, went the running theme among those interviewed, fall into the province of police, prosecutors and prosecuted.

What Stark first wants to know is:

What can be done to help?

What can be done to change consular policy?

He is well aware that our diplomats in Mexico carry a heavy workload, and he insists that he just wants to lighten that burden.

"They're so paranoid, it seems," said Stark, "but we're not out to get the State Department; we want to work with them. Do they need more money? Could they use some statutory changes?"

State, says Stark, has insisted that the problem isn't all that great. He doesn't buy that.

"I was told that the consulates were too busy when there were only 200 U.S. citizens in custody there. Now they've got 500."

Julyan added, "What we're trying to say is, it's not you (State) against us, nor is it us against them (Mexico). But we have to ask, are gringos being deprived of their rights under Mexican law? If so, we've got to correct that."

Are gringos indeed being deprived of those rights?

"We observe," said Stark, "that there is sufficient documentation of the allegations to warrant a thorough investigation. If they have, our government should look into it.

"This should not be just a whitewash."

Stark's involvement in the problem sprung from just two constituent complaints. Nine months of investigation produced 150 similar cases.

"If one congressman's office, with all its other duties—and without lots of help from the State Department—can find out what we've found out," asks Julyan, "what could a team of professionals provide by way of evidence?"

He quickly pointed out that, "We're not going to open the prison doors and put 'em on planes," but declared that the situation demands a thorough study.

"Isn't it a principle of American law to see—even at great expense—that the innocent don't suffer?" Julyan concluded.

Most of the innocent certainly don't suffer. By the millions, U.S. tourists travel the length and breadth of Mexico with only pleasure in their path.

The occasional innocent—or guilty—who winds up in the Mexican criminal justice system, however, deserves better treatment from his fellow humans.

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(Reprint of English text only)

EXHIBIT C

SINGLE CONVENTION ON NARCOTIC DRUGS, 1961

Between the
UNITED STATES OF AMERICA
and OTHER GOVERNMENTS

Done at New York March 30, 1961

(*b*) That governmental authorities, manufacturers, traders, scientists, scientific institutions and hospitals keep such records as will show the quantities of each drug manufactured and of each individual acquisition and disposal of drugs. Such records shall respectively be preserved for a period of not less than two years. Where counterfoil books (article 30, paragraph 2 (*b*)) of official prescriptions are used, such books including the counterfoils shall also be kept for a period of not less than two years.

Article 35

Action against the illicit traffic

Having due regard to their constitutional, legal and administrative systems, the Parties shall:

(*a*) Make arrangements at the national level for co-ordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such co-ordination;

(*b*) Assist each other in the campaign against the illicit traffic in narcotic drugs;

(*c*) Co-operate closely with each other and with the competent international organizations of which they are members with a view to maintaining a co-ordinated campaign against the illicit traffic;

(*d*) Ensure that international co-operation between the appropriate agencies be conducted in an expeditious manner; and

(*e*) Ensure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel.

Article 36

Penal provisions

1. Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(*a*) (i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

(ii) Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;

(iii) Foreign convictions for such offences shall be taken into account for the purpose of establishing recidivism; and

(iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given.

(b) It is desirable that the offences referred to in paragraph 1 and paragraph 2 (a) (ii) be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the Parties, and, as between any of the Parties which do not make extradition conditional on the existence of a treaty or on reciprocity, be recognized as extradition crimes; provided that extradition shall be granted in conformity with the law of the Party to which application is made, and that the Party shall have the right to refuse to effect the arrest or grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.

3. The provisions of this article shall be subject to the provisions of the criminal law of the Party concerned on questions of jurisdiction.

4. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

ARTICLE 37

Seizure and confiscation

Any drugs, substances and equipment used in or intended for the commission of any of the offences, referred to in article 36, shall be liable to seizure and confiscation.

ARTICLE 38

Treatment of drug addicts

1. The Parties shall give special attention to the provision of facilities for the medical treatment, care and rehabilitation of drug addicts.

2. If a Party has a serious problem of drug addiction and its economic resources permit, it is desirable that it establish adequate facilities for the effective treatment of drug addicts.

ARTICLE 39

Application of stricter national control measures than those required by this Convention

Notwithstanding anything contained in this Convention, a Party shall not be, or be deemed to be, precluded from adopting measures of control more strict or severe than those provided by this Convention and in particular from requiring that preparations in Schedule III or drugs in Schedule II be subject to all or such of the measures of control applicable to drugs in Schedule I as in its opinion is necessary or desirable for the protection of the public health or welfare.

ARTICLE 40

Languages of the Convention and procedure for signature, ratification and accession

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be open for signature until 1 August 1961 on behalf of any Member of the United Nations, of any non-member State which is a Party to the Statute of the International Court of Justice or member of a specialized agency of the United Nations, and also of any other State which the Council may invite to become a Party.

2. This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General.

3. This Convention shall be open after 1 August 1961 for accession by the States referred to in paragraph 1. The instruments of accession shall be deposited with the Secretary-General.

ARTICLE 41

Entry into force

1. This Convention shall come into force on the thirtieth day following the date on which

O'ROURKE

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 10 day of ~~May~~ Feb. 1977 deponent served the within BRIEF upon

U.S. Atty., So. Dist. of NY

attorney(s) for
Appellee

in this action, at

1 St. Andrews Pl.
NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 10 day
of Feb., 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978